



August 3, 2001

Ms. Kit Cahill
In-House Counsel
San Antonio Water System
P.O. Box 2449
San Antonio, Texas 78298-2449

OR2001-3374

Dear Ms. Cahill:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150273.

The San Antonio Water System (the "system") received a request for a copy of a specified proposal, Resolution No. 99-195, and a specified contract. You state that you have released Resolution No. 99-195 to the requestor. You claim, however, that the requested proposal and contract are excepted from disclosure pursuant to section 552.110 of the Government Code. We have considered the exception you claim and have reviewed the submitted information.

We note at the outset that the system failed to comply with the procedural requirements of section 552.301 of the Government Code. Section 552.301 provides that a governmental body that requests an attorney general decision concerning a request for information must, within a reasonable time but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general a copy of the written request for information. *See Gov't Code* § 552.301(e)(1)(B). Although you state that you provided a copy of the written request for information to us as Exhibit 1, we did not receive it within the information you submitted to us for review. Section 552.301(e) also provides that a governmental body must submit to the attorney general a copy of the specific information requested or submit representative samples of the information if a voluminous amount of information was requested. *See Gov't Code* § 552.301(e)(1)(D). Although you submitted what appears to be engineering plan specifications from Westin Engineering, Inc., you did not submit the requested Westin Engineering, Inc. contract. When a governmental body fails to submit a copy of the written request for information or the specific information requested, the information at issue is presumed public. *See Gov't Code* § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984,

no writ); Open Records Decision No. 319 (1982). The governmental body must demonstrate a compelling interest to withhold the information to overcome this presumption. *See id.* Normally, a compelling interest is some other source of law that makes the information confidential or a demonstration that third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Since you claim that the release of the proposal may implicate the proprietary interests of a third party under section 552.110 of the Government Code, we will address your claim regarding the proposal. However, since you did not submit the requested Westin Engineering, Inc. contract for our review, we have no basis on which to conclude that it is excepted from disclosure under the Public Information Act. Accordingly, you must release the contract to the requestor. *See* Gov't Code § 552.302.

Pursuant to section 552.305 of the Government Code, you notified the third party who may have a proprietary interest in the requested proposal, Transdyn Controls, Inc ("Transdyn"). *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). Transdyn argues that its proposal is excepted from disclosure in its entirety as commercial or financial information under section 552.110(b) of the Government Code. Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See* Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

Transdyn states that its business primarily consists of the niche "value-added" portion of the Supervisory Control and Data Acquisition ("SCADA") market. Transdyn also states that 80% of all procurements in this portion of the SCADA market are awarded based on evaluative components and not low price, since there are typically few competitors. Transdyn argues that disclosure of the submitted proposal would allow its competitors to "upgrade their proposals and re-focus their efforts for the sole purpose of overcoming Transdyn's current technical, proposal, and operational advantages." Further, Transdyn argues that release of the submitted proposal would allow its competitors to estimate Transdyn's future bids for the purpose of undercutting Transdyn's bids in future procurements. After reviewing the submitted proposal and the arguments presented, we

conclude that Transdyn has demonstrated based on specific factual evidence that the release of sections 1, 2.5, 3, 7 through 9, and both appendices of the proposal would cause it substantial competitive harm. Consequently, you must withhold this information in Transdyn's proposal from disclosure pursuant to section 552.110(b) of the Government Code. However, we conclude that you must release the remaining portions of section 2 and section 6 to the requestor.

Transdyn also argues that sections 4 and 5 of its proposal are excepted from disclosure under section 552.110(a) of the Government Code as trade secret information. Section 552.110(a) protects trade secrets of private parties. The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law.¹ *See Open Records Decision No. 552 at 5 (1990).*

Based on your arguments and our review of the submitted information, we conclude that section 5 of Transdyn's proposal which consists of Transdyn's prior experience and list of

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS, § 757 cmt. b (1939); *see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).*

customers constitutes trade secret information. Accordingly, you must withhold section 5 of Transdyn's proposal from disclosure pursuant to section 552.110(a) of the Government Code. However, section 4 of Transdyn's proposal which relates to Transdyn's project team does not constitute trade secret information under section 552.110. *SEE RESTATEMENT OF TORTS* § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); Open Records Decision No. 319 (1982) (information relating to organization, personnel, qualifications, and experience not ordinarily trade secret information). Accordingly, you must release section 4 of Transdyn's proposal to the requestor.

In summary, you must release the Westin Engineering, Inc. contract to the requestor. You must withhold from disclosure sections 1, 2.5, 3, 7 through 9, and both appendices of Transdyn's proposal pursuant to section 552.110(b) of the Government Code. You must withhold from disclosure section 5 of Transdyn's proposal pursuant to section 552.110(a) of the Government Code. You must release the remaining portions of section 2, as well as sections 4 and 6 of Transdyn's proposal to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 150273

Enc. Submitted documents

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